LIBRARY
SUPREME COURT, U. S.

JAN 3 1968
JOHN F. DAVIS, CLERK

No. 878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SCOTT'S, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Argument	7
Conclusion	12

CITATIONS

CASES:

J. P. Stevens & Co. v. *NLRB*, 380 F. 2d 292 (2nd Cir., 1967), certiorari denied, No. 684, O.T., 1967 ..... 8, 9
Local 171, Pulp and Paper Workers (Boise Cascade Corp.), 165 NLRB No. 97, 65 LRRM 1382 (1967) .. 11
Montgomery Ward & Co. v. *NLRB*, 339 F. 2d 889 (6th Cir., 1965) 8
NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) .. 10
NLRB v. *Elson Bottling Co.*, 379 F. 2d 223 (6th Cir., 1967) 7, 8
NLRB v. *United Aircraft Corp.*, 324 F. 2d 128 (2d Cir. 1963), certiorari denied, 376 U.S. 951 12
NLRB v. *United Steelworkers*, 357 U.S. 357 (1958) 10
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 (1945) 10

STATUTE:

National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), Section 10(c) 2

MISCELLANEOUS:

de Grazia, Sebastian, *Of Time, Work and Leisure*, 20th Century Fund (1962) pp. 90, 96 11
Gilmer, Beverly, *Industrial Psychology*, McGraw-Hill (1961), p. 232 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 878

SCOTT'S, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court below is officially reported in 383 F. 2d 230 and unofficially reported in 66 LRRM 2081 and in 56 LC ¶ 12,159. The decision and order of the National Labor Relations Board (J.A. 663-687) is officially reported in 159 NLRB 1795 and unofficially reported in 62 LRRM 1543 and in 1966 CCH NLRB ¶ 20,621.

JURISDICTION

The decree of the court below was entered on November 13, 1967. The petition for a writ of certiorari was filed on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Upon findings by the National Labor Relations Board that an employer has engaged in "deliberate and massive violations" of the National Labor Relations Act, numbering in all 27 separate independent violations of Section 8(a)(1) including interrogation and coercive captive audience speeches, 15 separate independent violations of Section 8(a)(3) including discharges, transfers and layoffs, and violations of Section 8(a)(2) by forming and dominating an employees' committee, whether the Board has the power to order the employer (a) to make available to the union suitable facilities, at each of its plants where the unfair labor practices occurred, for a one-hour meeting so that the union may present its views to the employees assembled on employer time; and (b) to grant the union reasonable access to the employer's bulletin boards for a three-month period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

"Sec. 10. * * *

* * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *"

STATEMENT OF THE CASE

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, began an organizing campaign among the theretofore unorganized production and maintenance employees at the two plants of Scott's Inc., located in Holland, Michigan and at its plant in Douglas, Michigan, in March 1964 (J.A. 663-664). During April and May 1964, the employees at each of these plants were assembled to hear speeches made to them on company time by Willis Vandenberg who is in charge of labor relations for Scott's and is also a Vice-President of Crampton Manufacturing Company, of which Scott's, Inc., is a subsidiary (J.A. 664). In each of these speeches Vice-President Vandenberg threatened employees with loss of jobs, transfer of work to other plants and new unfavorable working conditions if the Union succeeded in organizing Scott's (J.A. 664-666). Vice-President Vandenberg also told the employees that the parent corporation, Crampton, had an employees' committee still operating "although the 'Labor Board had made them post notices apologizing for the committee and other things they had done. . . . They slapped our hands just like we were naughty little children. They just don't label it a committee any more' " (J.A. 665). The Board found that these statements "clearly convey to employees the idea that the guarantees of the Act could be circumvented with im-

punity", and "cast Board protection of employee statutory rights into disrepute" (J.A. 665-666).

Will J. Scott, who is President of Scott's, Inc., during April 1964, spoke to a group of employees some of whom were wearing union buttons, stating, "You guys are going to eat them badges before this is through" (J.A. 599). To other employees President Scott variously made statements that if the Union came in the "first thing" that the Company would do would be to "cancel all holiday pay, vacation pay, insurance and seniority", that "everything would start from scratch", that if the Union negotiated, it would not "get very much" (J.A. 599), that "we are going to get rid of all you badge-toters, soon or later, it is only a matter of time . . . I could have . . . got rid of you but we didn't figure you'd give a damn" (J.A. 599-600), "those boys wearing the badges" would all discharged "at one time or another . . . just a matter of time" (J.A. 600), that seniority did not mean anything "anymore", that he was going to teach the Union adherents "a thing or two before this was all over" (J.A. 601), that it didn't look like seniority meant anything any more and that "if you boys are going to carry on like this . . . we are at war and we have to fight fire with fire" (J.A. 601).

In all, the Board found that Scott's, Inc., had engaged in 27 separate independent violations of Section 8(a)(1) of the Act, including interrogation, threats of reprisal and promises of benefit (J.A. 598-601, 611-614, 638, 643, 644, 654, 664-666), 15 separate violations of Section 8(a)(3) including discriminatory discharges, transfers and layoffs of union adherents (J.A. 624-628, 630-637, 642-651, 653, 668), and violations of Section 8(a)(2) by forming and dominating an em-

ployees' committee (J.A. 616-619, 668). The complaint alleged that the employer had committed other unfair labor practices but the Board did not rule on these since findings of additional unfair labor practices "would merely be cumulative and would not affect the remedy" (J.A. 668, fn. 5).

The Board determined that its order should include not only the usual cease and desist, reinstatement, back pay, and notice posting provisions but certain additional provisions designed to remedy the particular unfair labor practices involved. Insofar as here pertinent, the Board's decision explained the additional remedial provisions of its order as follows (J.A. 679-680):

> "We have concluded, however, that the following would be appropriate as a remedy for the Respondent's massive and deliberate violations of the Act in this case. * * *
>
> "As Respondent violated the rights of those employees who had not yet had a chance to formulate their desires with regard to representation as well as the rights of those who had done so, we deem it appropriate that employees be afforded further opportunity to engage in organizational efforts. To this end, we shall require that, upon request of the Union make within 1 month of this Decision, the Respondent immediately grant the Union and its representative reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted. Further, in order to redress the imbalance created by Respondent's action in delivering a coercive speech to its employees assembled on company time and premises, we shall require that the Union be given an opportunity to present its views under similar circumstances. Accordingly, we

shall require that, upon request of the Union, Respondent shall make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decision, suitable facilities such as are customarily used for employee meetings so that the Union may speak to the employees assembled on company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants.[12]

"[12] *H. W. Elson Bottling Company, supra.*"

The Board's order accordingly included the following provisions (J.A. 682-683):

"2. Take the following affirmative action which we find will effectuate the policies of the Act:"

* * *

"(f) Upon request of the Union made within 1 month of this Decision, immediately grant the Union and its representatives reasonable access for a 3-month period to its bulletin boards and all places where notices to employees are customarily posted."

* * *

"(h) Upon request of the Union, make available to the Union and its representatives, at a mutually agreeable time within 3 months of this Decision, suitable facilities such as are customarily used for employee meetings so that the Union may present its views to the employees assembled on Company time. Such facilities shall be made available for one 1-hour meeting at each of Respondent's plants."

The United States Court of Appeals for the District of Columbia Circuit unanimously upheld all of the Board's findings of fact and unanimously enforced all the provisions of the Board's order except for one pro-

vision respecting reading of notices, which is not here material. With respect to the provisions of the order for the one hour speech on company time and property, the court distinguished the decision of *NLRB* v. *H. W. Elson Bottling Co.*, 379 F. 2d 223 (6th Cir., 1967) where such an order was enforced but with modifications, as follows (Pet., p. 14, fn. 4):

> "The aggravated circumstances there mentioned but not present are found here; therefore, such a remedy is approved."

The decree entered by the court below includes the above quoted paragraph 2(f) and (g) with merely the change of the word Order each place it appeared to the word Decree (Pet. p. 18).

ARGUMENT

The issue of whether the Board has the power to remedy employer unfair labor practices by ordering an employer to grant the victimized union access to employees through use of plant bulletin boards and plant meeting facilities, is undoubtedly important. However, we believe that the power of the Board to provide these remedies is too clear to warrant review by this Court. There are no court decisions which question the Board's power to order such remedies in a situation where the nature of the employer unfair labor practices make these remedies particularly appropriate.

An order containing the same provision for use of bulletin boards was enforced by the United States Court of Appeals for the Sixth Circuit, without any discussion, in the case of *NLRB* v. *Elson Bottling Co.*, 379 F. 2d 223, 226 (6th Cir., 1967). In two cases, the

courts of appeals have enforced, as modified, orders for use of employer facilities for in-plant meetings on company time to be addressed by union representatives. In the first of these cases the Board made the provision of such a meeting operative only if the employer thereafter held a captive audience meeting. The court enforced with two modifications, one limiting this provision to the plant where the unfair labor practices had occurred and the other limiting this provision to the period preceding a scheduled Board election. *Montgomery Ward & Co.* v. *NLRB,* 339 F. 2d 889, 894-895 (6th Cir., 1965). In the second, where the Board order was not limited so as to apply only in the event the employer conducted captive audience meetings, the court modified to so limit the order. *NLRB* v. *Elson Bottling Co.,* 379 F. 2d 223, 226-227 (6th Cir., 1967). Here there have already been captive audience meetings at which the employer committed unfair labor practices. So the order here properly was enforced without any such modification.

The only case in which a use-of-the-bulletin-boards remedy was set aside is *J. P. Stevens & Co.* v. *NLRB,* 380 F. 2d 292 (2nd Cir., 1967), certiorari denied, December 11, 1967, No. 684, O.T., 1967. In that case the United States Court of Appeals for the Second Circuit did not suggest that the Board lacked power to remedy unfair labor practices by requiring an employer to accord the union the use of bulletin boards. Rather, the Court of Appeals for the Second Circuit explicitly based its decision on the absence in that case of any Board finding or showing as to the necessity of use of bulletin boards, stating: "Here the Board made virtually no findings concerning the issues relevant to solicitation, and made no adequate showing that the

company's bulletin boards are necessary to the union in its organizational campaign" (380 F. 2d at 305). Since that decision turns on the state of the evidence and findings, it constitutes no holding as to the power of the Board. Hence it presents no conflict as to the question presented by the petition for certiorari in this case.

Moreover, while the Board in the *J. P. Stevens* case (157 NLRB 869, 878) used the same terms to describe the unfair labor practices there involved as it used in the instant case, "massive and deliberate" (J.A. 679), the unfair labor practices in the *J. P. Stevens* case did differ from those present in the instant case in that the *J. P. Stevens* case included neither coercive captive audience speeches, nor oral speeches or statements by top corporate management. Employees of Scott's, Inc., were subjected to a barrage of oral statements in the plant during working hours by the president of the employer company and by the vice president of the parent corporation in an extensive propaganda campaign against the Union. The presence of such unfair labor practices in the case at bar made the remedies devised for these unfair labor practices peculiarly appropriate.

Here the Board found "an imbalance created by Respondent's action in delivering a coercive speech to its employees assembled on company time and premises" (J.A. 680). While this particular finding was made in relation to the offsetting of this "imbalance" by use of the captive audience for a Union conducted meeting (J.A. 680), the use of bulletin boards similarly is appropriate to offset the imbalance of daily oral anti-union statements to employees in the plant during

working hours by employer corporate officers, personnel director and supervisory employees.

The petitioner asserts (Pet. p. 7) that the Board was required to, and here had not, balanced property rights against the right to organize, as it had done in *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793 (1945); *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956) and *NLRB* v. *United Steelworkers,* 357 U.S. 357 (1958). Those cases all involved the issue of whether an employer committed an unfair labor practice by denying its facilities to a union. The cases did not involve any issue of the appropriate remedial order when an employer had committed the unfair labor practice of using its facilities for anti-union purposes. As the Board here found, it is the employer use of employer property and employer time for anti-union purposes which constitutes the unfair labor practice for which the Board must devise a remedy.

Once an employer has engaged in unfair labor practices in which the employer's president as well as corporate officials of its parent corporation commit themselves to defeat of the union, including captive audience speeches to all employees in which contempt for the National Labor Relations Board was expressly stated (J.A. 666), no amount of use of employer facilities by a union can overcome the fear of employer retaliation which employees feel. But use of company facilities can serve to counteract the employer unfair labor practices by providing the union with avenues of communication to employees which approximate the avenues of communication which the employer enjoys. There is no possible way for the union to reach all the employees in as all inclusive and effective way as the employer

has already reached these employees unless the union is permitted to use company facilities.

Any consideration of the other channels open to the Union shows how disparate is the opportunity for the Union to counteract employer unfair labor practices without using employer facilities. The fear of the employee that the employer will retaliate against him if he is seen accepting union literature at the gate or attending a union meeting can only be obviated by use of plant bulletin boards and meeting in the plant.

Aside from fear of employer reprisal if the employee voluntarily receives the union message, pressures of modern living make the likelihood of the union equalizing its ability to reach the employee remote. Handbill distribution at plant gates as a means of reaching employees suffers from the rushing of employees to get to work or to get home. Attendance at union meetings away from the plant on the employee's own time is usually low because of long hours of work, including travel to and from work and the demands on the nonworking time of employees. These demands are usually so great as to make attendance at union meetings, even where there is no fear of employer retaliation, possible only for a few of the employees except on rare occasions of great importance to employees such as ratifying a contract or calling a strike.[1] Unions do not have ac-

---

[1] See Sebastian de Grazia, Of Time, Work and Leisure, 20th Century Fund (1962), who summarizes studies showing that "Since 1850 free time has not appreciably increased" (p. 90) and that "work time" "takes up an average of 10 hours and 40 minutes a day" when transportation to and from work is included, and on work days the worker has "time free" of "only about one hour" (p. 96). On the low attendance at union meetings not due to any antipathy to unions see Beverly Gilmer, Industrial Psychology, McGraw-Hill (1961) p. 232; *Local 171, Pulp and Paper Workers (Boise Cascade Corp.)*, 165 NLRB No. 97, 65 LRRM 1382 (1967).

cess to employees' addresses. But if instead of granting the use of employer bulletin boards and meeting rooms, the employer were required to supply a mailing list, a remedy we advocate and hope the Board will begin to adopt on a wide scale, still even such a remedy, helpful as it would be, would not equalize the opportunity for communication because "Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket", *NLRB* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (2d Cir. 1963), certiorari denied, 376 U.S. 951. Even if read, written matter is usually ineffective to offset completely oral employer communications.

Given these realities of present day employment relations, the Board's order was not only within its power but reasonable as a remedy for the unfair labor practices committed by Scott's, Inc.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent

January 2, 1968